Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	)	CC Docket No. 96-146
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services and Toll-Free Number Usage	)	CC Docket 04-244
Truth-in-Billing and Billing Format	)	CC Docket 98-170
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards	)	RM-8783
Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services	)	ENF-95-20

REPLY COMMENTS
OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

November 29, 2004

On July 16, 2004, the Federal Communications Commission ("FCC" or "Commission") issued a Notice of Proposed Rulemaking and Memorandum Opinion and Order (NOPRM) in order to review the effectiveness of the rules governing pay-per-call services, related audiotext information services, and toll-free numbers.[1] Initial comments were filed by the National Association of State Utility Consumer Advocates ("NASUCA")[2], Pilgrim Telephone, Inc. ("Pilgrim"), Metro One Communications, and AT&T. NASUCA submits these Reply Comments in response to the November 15, 2004 comments filed by Pilgrim and AT&T. [3]

I. CONSUMER PROTECTION

Pilgrim notes that most information service providers have moved to dialing and billing platforms other than 900.[4] These other platforms include toll free, international and Plain Old Telephone Service ("POTS").[5] Pilgrim also recognizes that the problem is that most of the Commission's pay-per-call consumer protections do not extend to those other platforms.[6] Pilgrim urges the Commission to "separate the consumer protections that work from those that

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[1] Notice of Proposed Rulemaking and Memorandum Opinion and Order, CC Docket No. 96-146 et. al (July 16, 2004) at 2.

[2] NASUCA is a voluntary, national association of 44 consumer advocates in 42 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[3] MetroOne's comments focused on Enhanced Electronic Directory Assistance. NASUCA has no comment on MetroOne's issue.

[4] Pilgrim Comments at 10 (November 15, 2004).

[5] Id.

[6] Id.

do not, and uniformly apply them to all service platforms."[7] NASUCA agrees that the essential characteristics of audiotext services are the same, regardless of the dialing pattern used to provide them. In turn, the harm to consumers from fraud and deception is the same, regardless of the form of audiotext service. Consequently, NASUCA supports the application of consumer protections to these alternative platforms. NASUCA, however, defines the scope of "consumer protections that work" much differently than Pilgrim.

Pilgrim appropriately notes that 900 number blocking is essentially without value in the current environment, as a consequence of the migration of information services to alternative platforms.[8] Additionally, Pilgrim emphasizes the fact that the blocking mechanism does not screen for minors or unauthorized use, but instead prevents access by all callers.[9] Pilgrim argues that pre-subscription, comparable arrangements, and voice recordings of authorizations to provide service and screening mechanisms all provide more protection.[10]

NASUCA agrees that the value of blocking is diminished as a result of the migration of information services to alternative platforms. However, blocking of calls should not be abandoned, but should continue to be an option available to consumers who choose it for their protection.

Pre-subscription agreements can also provide consumer protections, but to be effective these agreements need to meet certain standards. These standards include: the agreement must be in writing, not orally made; the agreement must be separate from promotional materials; and, the agreement would need to be reached prior to the provision of the pay-per-call services.

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[7] Id.

[8] Id.

[9] Id. at 17.

[10] Id. at 19.

These are just the standards Pilgrim is complaining about. Pilgrim places great emphasis on the need for consumers to access the service on demand, without delay.[11] Toward that end, Pilgrim proposes two new methods of establishing a pre-subscription arrangement under the rules. At a pre-subscription "session" the information services provider would provide consumers with rules of service. At that time consumers would be required to respond to a list of questions designed to verify the consumer's identity (including age) and obtain the consumer's authorization for access to the service from the calling line.[12]

Under Pilgrim's proposal, the provider then could choose between two verification methods: third party verification or the mailing of a welcome package to the subscriber with instant access to the service.[13] In the second scenario, the billings would be held for 10 days, until the customer had a chance to call and revoke the account as unauthorized or the package was returned undelivered.[14] If neither event took place, the subscriber account would be made permanent and billings would be processed.

While NASUCA believes that access to service on demand without delay may be desirable for the most part, the benefits of instant service do not outweigh the need for consumer protections. Pilgrim's proposals on pre-subscription are objectionable on a number of grounds. First, Pilgrim appears to propose that pay-per-call services may be provided without written authorization. Pilgrim's pre-subscription "session" falls far short of written authorization.

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[11] Id. at 20.

[12] Id.

[13] Id.

[14] Id.

Although the session is followed up by verification[15] (verification by third party or through the welcome package), it does not amount to written authorization prior to service being provided. Rather, under Pilgrim's proposals subscribers would receive service instantly without a written authorization agreement.

Second, Pilgrim's proposed verification via a welcome package is an opt-out process. Consumers would be required to take affirmative action to negate the agreement; otherwise, they will have presubscribed without any more action than participating in a subscription session. NASUCA does not believe that an opt-out is equivalent to express authorization of pay-per-call services. Approval or authorization is clearly an active rather than a passive requirement. "Opt out," which would require a customer to take affirmative action to disengage from pay-per-call services, is not approval or authorization; instead it involves a failure to object.

A subscription session could be a useful tool and is not necessarily objectionable, if used under the following constraints: Following a subscription session, the information services provider could transmit a pre-subscription agreement (in writing) to the subscriber. The subscriber could then opt-into the pay per call service, by contacting the pay-per-call provider or a designated independent third party. Once the pay-per-call service provider receives a signed copy of the pre-subscription agreement, then services (and billing) may be initiated.

Nor are voice recordings of authorizations a suitable replacement for a written pre-subscription agreement. Such recordings can be altered to use a "yes" answer to a question unrelated to purchase as proof that a consumer has agreed to the purchase.[16]

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[15] Pilgrim's third party verification scheme also creates pitfalls for consumers beyond those discussed supra. Pilgrim fails to acknowledge the need for verification to be accomplished through an independent third party.

[16] See, for example, FTC File No. R611016, National Consumers League Comments (Mar. 10, 1999), ¶ 14.

The FCC in its NOPRM points out a phenomena known as "modem hijacking." Modem hijacking occurs when local calls are redirected without the caller's authorization through software programs, which disconnect Internet users' calls and dial international numbers. In response to the modem hijacking issue raised by the FCC, Pilgrim asserts that notice and acceptance requirements could adequately address this problem.[17] Pilgrim believes these requirements could be as simple as an electronic record or recorded oral verification.[18] Moreover, Pilgrim opines that modem hijacking is a specialized type of fraud that is outside of the scope of pay-per-call and information services, and as such "is not particularly relevant in this proceeding."

Notice and acceptance requirements could address the modem hijacking issues raised by the FCC, if those requirements were the same as those discussed above: the agreement must be in writing, not orally made; the agreement must be separate from promotional materials; and, the agreement would need to be reached prior to the provision of the pay-per-call services. Use of an electronic record or recorded oral verification are just not sufficient to ensure that callers have necessary information to make informed choices.

Additionally, modem hijacking is fraud that is well within the scope of pay-per-call and information services and is relevant to this proceeding. Whether a service is a pay-per-call service is not dependant on the means by which the call is provided. Rather, it is the nature of the service provided that brings it under the Commission's jurisdiction and regulation. In modem hijacking, customers receive services or products where the per-call interval charge is greater than or in addition to the charge for transmission of the call. That brings the service

[17] Pilgrim Comments at 10.

[18] Id.

squarely within the oversight and regulation of the FCC, though it is arguably "outside the standard pay call application."[19]

II. MISCELLANEOUS ISSUES

A. The Need for Certainty

Pilgrim urges the Commission to "now move quickly but deliberately to take final action in this proceeding and end the uncertainty that has plagued consumers and industry participants alike."[20] NASUCA agrees that final action by the FCC is needed. However, Pilgrim goes on to request that the Commission issue "a further notice of proposed rule making that presents specific and concrete proposals which can be evaluated by interested parties before the Commission takes final action."[21] Here NASUCA disagrees. NASUCA believes that the FCC's current Notice of Proposed Rulemaking does just that. To require further proceedings would only add to the delay and uncertainty about which Pilgrim is complaining.

B. Billing Issues

Pilgrim notes its experience that most complaints arise from the truth in billing rules, in particular those requiring that the actual number dialed be placed on the bill.[22] It notes that customer confusion is created when consumers receive a bill indicating a charge for an 800 number, when instead the charge was for information services separately purchased.[23] Pilgrim proposes that an information service provider place the final number reached on the bill, instead

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[19] See NOPRM (July 16, 2004), ¶ 17.

[20] Pilgrim Comments at ii.

[21] Id.

[22] Id.

[23] Id.

of the 800 number dialed to avoid unnecessary confusion. NASUCA supports adoption of this proposal, along with its proposal in its initial comments that the name and mailing address of the provider of pay-per-call services be placed on customers' bills. This will provide customers with sufficient information to confirm that the bills reflect only services they have ordered and received, at agreed to prices.

C. Extension of Protection to Subscribers

Pilgrim argues that the Commission should not extend toll-free number protections to subscribing parties.[24] Rather, Pilgrim proposes adopting regulations to address this problem. Pilgrim proposes that information service providers should use and keep voice prints to verify that a calling party has agreed to the terms of the service.[25] Pilgrim believes that this will assist billing entities in tracking down fraud and will be of value to subscribers in determining who, with access to the telephone, may have incurred the charges.[26] NASUCA continues to support the extension of toll free number protections to subscribers as well as callers. However, should the Commission determine not to do so, NASUCA would support adopting the regulations proposed by Pilgrim.

D. Use of Number Identifications

Pilgrim notes the FCC's rules that prohibit billing on the basis of automatic number identification ("ANI") are ambiguous.[27] It seeks clarification on what is meant by "prohibition".[28] Pilgrim argues that use of ANI to confirm identity or open an account should be

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[24] Id. at 14-15.

[25] Id. at 15.

[26] Id.

[27] Id. at 16.

[28] Id.

permitted, even if billing solely based upon ANI is prohibited. Clarification from the Commission would be helpful here. NASUCA supports Pilgrim's position on ANI, so long as ANI is used only in conjunction with a pre-subscription agreement, in writing, executed prior to the provision of the pay-per-call service.

E. Revenue-Sharing Arrangements

Pilgrim believes that the Commission does not need to prohibit revenue-sharing arrangements, but should "review all relationships between carriers and information service providers and adopt a mechanism for determining when such relationships are reasonable."[29] Pilgrim proposes a benchmark rate whereby all carrier/information service provider relationships are presumed to be valid. That benchmark rate would be the per-minute rate of the call charged by either the dominant carrier or that of any one of the three largest carriers providing the equivalent service.[30]

NASUCA agrees with AT&T[31] that the Commission should uphold its previous determination that any form of remuneration to an entity providing or advertising an information service by a common carrier that charges a telephone subscriber for an interstate call to that information service is *per se* evidence that the arrangement is a pay-per-call service.[32] Thus, the services must be offered in compliance with the provisions under the Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA")[33] and the Commission's implementing regulations. NASUCA recognizes that there is no prohibition on such arrangements. Rather, such

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[29] Id. at 18.

[30] Id.

[31] AT&T Comments at 5-7.

[32] Id.

[33] 106 Stat. 4181 (1992) (*codified at* 47 U.S.C. § 228).

arrangements must comply with the statute. NASUCA does not believe that a proposal such as that offered by Pilgrim is workable. Pilgrim's approach would require a great deal of Commission resources to monitor all the relationships between the carriers and information services providers.

F. Wireless Services

Pilgrim argues that wireless services should be exempt from these consumer protection regulations.[34] Pilgrim argues that the consumer protection concerns that apply to use of wireline phones do not apply to wireless phones.[35]

> Wireless phones are provided to individuals, and are not tied to specific locations like land line phones. Wireless customers enter into subscription agreements with their carriers, and these agreements can incorporate terms that authorize access to information services. As a consequence, there is no need for the Commission to undertake the promulgation of rules applicable to the provision of information services to wireless phones.[36]

According to Pilgrim, the Commission's proposal "would impose unnecessary and burdensome requirements on legitimate carriers and Internet Providers who pose no threat to consumer well-being and are striving to meet consumer demand for a wide array of information services."[37]

The approach advocated by Pilgrim is inadvisable. Pilgrim's conclusion that wireless subscribers do not need protection from fraudulent pay-per-call practices is erroneous. The nature of wireless phone service does not support a broad exemption from the consumer protection provisions of the TDDRA and the Telecommunications Act of 1996 ("the 1996

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[34] Pilgrim Comments at 23.

[35] Id.

[36] Id.

[37] Comments at 24.

Act").[38] The consumer fraud protections are targeted to consumers, not to instruments used to facilitate pay-per-call services. Cellular customers are in need of consumer fraud protection just like wireline customers.

Moreover, the distinctions between wireless and wireline service that Pilgrim emphasizes are not necessary valid. The service agreements cell phone customers enter into are in many cases akin to those agreements that wireline customers enter. Both have terms of service and price provisions in them. While wireline contracts or tariffs do not generally have explicit terms that offer access to information services, NASUCA does not believe that such provisions 1) are contained in all wireless service contracts or 2) apply to all information services, not just to those offered by the wireless carrier. In those cases where a wireless contract includes written authorization of information services with specified vendors, it would appear that a pre-subscription agreement has been accomplished, thereby satisfying the consumer protection provisions of the TDDRA and the 1996 Act. However, the mere fact that a consumer happens to be a wireless customer should not be cause to conclude that the consumer has expressly consented to the terms of all pay-per-call services made on the consumer's wireless phone.

III. CONCLUSION

NASUCA's recommendations are premised upon protecting consumers from rampant abuses that are occurring in the pay-per-call-service industry. Limiting the scope of pay-per-call services to 900 numbers only, assuring that there is true consent to services, allowing appropriate billing, and establishing additional rules for recourse are essential to preserving consumer protection under the regulatory scheme set forth in the TDDRA and the 1996 Act. NASUCA urges the Commission to adopt the recommendations discussed herein and in NASUCA's original comments.

[38] Pub. L. No. 104-104, 110 Stat. 56.

Respectfully submitted,

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